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IN THE
Supreme Court of the United States
October Term, 1985

No. 85-1347

Commonwealth of Pennsylvania,

vs.

Petitioner,

George F. Ritchie,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE BRIEF, AMICI CURIAE, AND
BRIEF, AMICI CURIAE, OF THE SUNNY VON BÜLOW
NATIONAL VICTIM ADVOCACY CENTER, INC. JOINED BY
THE NEW YORK STATE CRIME VICTIMS BOARD, THE
LEGAL FOUNDATION OF AMERICA, INC. AND THE
NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN,
INC. IN SUPPORT OF THE PETITIONER.

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MOTION FOR LEAVE TO FILE AMICI CURIAE

Come now The Sunny von Bülow National Victim Advocacy Center, Inc., et al, and respectfully move this Court for leave to file and join the attached brief, amici curiae, in support of the Petitioner, and declare as follows:

1. Identity and Interest of Amici Curiae:

THE SUNNY VON BÜLOW NATIONAL VICTIM ADVOCACY CENTER, INC., is a national, not-for-profit organization, the purposes of which are to promote responsiveness of the judicial system to the rights and needs of the victims of violent crime and to implement programs to heighten America's consciousness concerning the plight of victims.

The NEW YOUR STATE CRIME VICTIMS BOARD is an agency of the State of New York, established in 1966 to financially compensate crime victims and their families. In 1979, the Board was given additional authority to advocate for the rights and interests of crime victims.

THE LEGAL FOUNDATION OF AMERICA is a nonprofit corporation supporting the operations of a public interest law firm. Among

other goals, it seeks to preserve a national criminal justice system in which adjudications of guilt are reliable rather than haphazard.

THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, INC. is a national, nonprofit organization founded to improve legal protection for children. The purpose of the National Association of Counsel for Children is to provide training and information to child advocates and to establish a strong foundation of member practitioners from various professions who work with children affected by legal proceedings.

2. Desirability of a Brief Amici Curiae.

The instant case is one in which the interests of victims of crime, specifically children who have been sexually abused, are directly involved. Amici represent: 1) a national victim advocacy organization in the private sector; 2) a state victims advocacy organization; 3) a national organization concerned with constitutional issues in criminal law; and, 4) a national organization for children which was founded to improve legal protection for children. Amici possess knowledge, of an empirical nature, about the potential impact of this Court's decision on the rights of child sexual abuse victims which they wish to share with this Court.

3. Reasons for Believing That Existing Briefs May Not Present All Issues, and Avoidance of Duplication.

Amici will discuss, in this brief, national, policy-related issues relating to the impact of this Court's decision in the instant case. Counsel for Amici have consulted with Counsel for Petitioner in an effort to avoid unnecessary duplication and believe that their policy arguments will present issues that are not otherwise raised.

4. Consent of Parties.

Counsel for Petitioner has consented to this filing; Counsel for Respondent has advised that he will neither consent nor object to this filing..Letters to this effect have been lodged with the Clerk of this Court.

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INTEREST OF AMICI CURIAE

The interest of Amici Curiae, together with their reasons for desirability of filing this brief and statement of avoidance of duplication have been set forth in the attached Motion for Leave to File a Brief Amici Curiae.

ARGUMENT

IMPORTANT POLICY CONSIDERATIONS DICTATE THAT THE CONFIDENTIALITY OF RECORDS IN CHILD ABUSE CASES SHOULD BE PRESERVED.

A. THE "CONFRONTATION CLAUSE" OF THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES DOES NOT MANDATE, IN CHILD ABUSE CASES, A "RIGHT TO RUMMAGE" IN OTHERWISE-PRIVILEGED FILES PERTAINING TO SUCH CASES.

This Court, in Davis v. Alaska, 415 U.S. 308 (1974), enunciated a carefully-reasoned balancing test involving the defendant's Sixth Amendment right of confrontation of witnesses against him, on the one hand, and the rights of society and the victims of crime on the other hand. The Supreme Court of Pennsylvania, in the instant case, misinterpreted this balancing test, holding that the Commonwealth's interest in maintaining the statutorily-mandated¹ confidentiality of child abuse records could not override a defendant's right to confront and cross examine witnesses against him.

As Justice Larsen noted in his dissenting opinion in the instant case, the majority weighed the "careful balance" of Davis v. Alaska, *supra*, "...heavily in favor of the defendant..."² Amici submit that the majority weighed the balance far too heavily in favor of the defendant. In effect, the majority created a novel Constitutional "right to rummage" through all otherwise-confidential Child Welfare Services' records, despite the fact that (a) the prosecution had made no use whatever of the files in question; and, (b) defense counsel's request to review these files was in no way particularized but, rather, was based on conclusory representations that there "could be" material helpful to the defendant in such files.

During its October, 1985 Term, this Court cautioned against the creation of new, fundamental constitutional rights where there was no support for such innovation in law or in legislative history. Albeit in another context, that of the "right" of individuals to engage in private homosexual acts, this Court in Bowers v. Hardwick, ____ U.S.____, 39 Cr. L. 3261 (1986), stated:

1. Pennsylvania Stat., Act. 1975, November 26, P.L. 438, No. 124, Sec. 15.

2. 502 A. 2d 148 (1985), dissenting opinion, Slip. op., at 14a.

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights embedded in the Due Process clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made Constitutional law having little or no cognizable roots in the language or design of the Constitution.

U.S.____, 39 Cr. L., at 3263.

As Petitioner has pointed out in its Petition for Certiorari, the clear and announced legislative purpose of Pennsylvania's Child Protective Services Law was to "...encourage more complete reporting of suspected child abuse".³ Additionally, this Court recently made it clear that rights under the Confrontation Clause of the Sixth Amendment to the Constitution of the United States were not absolute. In Delaware v. Van Arsdall, ____ U.S.____, 39 Cr. L. 3007 (1986), the Court held that the denial of a defendant's opportunity to impeach a witness for bias, in violation of the Sixth Amendment's Confrontation Clause, is subject to harmless error analysis under Chapman v. California, 386 U.S. 18 (1967). The Court noted: "As we have stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one". ____ U.S., at ____ , 39 Cr. L., at 3009⁴.

Similarly, in U.S. v. Bagley, ____ U.S.____, 106 S. Ct. 1215 (1985), the Court held that suppression of impeachment or other exculpatory evidence amounts to constitutional error only if such evidence is material in the sense that its suppression undermines confidence in the outcome of the trial. Other courts have reached similar conclusions in analogous situations.⁵

Given the two principles: 1) that courts should exercise "great resistance"⁶ towards creating fundamental constitutional rights out of whole cloth; and, 2) that this Court and other courts have held that defendants' rights under the Sixth Amendment's Confrontation Clause are not absolute, then the countervailing public policy issues involving the right of the state to bring criminals to justice, and the rights of the victims of crimes, should be given more than usual consideration in the "balancing" of such rights against defendants' Confrontation Clause rights.

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- 3. Petition for Certiorari of the Commonwealth of Pennsylvania in the instant case, at 17.
 - 4. See also: Delaware v. Fensterer, ____ U.S.____, 106 S. Ct. 292 (1985).
 - 5. See, e.g.: Camsitch v. Risley, 705 F. 2nd 351 (9th Cir. 1983); People v. District Court, 719 P. 2d 222 (Colo. 1986); In re Robert H. 509 A. 2d 475 (Conn. 1986); State v. Storlozzi, 464 A. 2d 829 (Conn. 1983).
 - 6. Bowers v. Hardwick, ____ U.S., at ____ , 39 Cr. L., at 3263.

B. PUBLIC POLICY CONSIDERATIONS DICTATE THAT CONFIDENTIALITY OF FILES IN CHILD ABUSE CASES BE MAINTAINED.

There can be no real question that child sexual abuse is a major problem confronting this country today. The Child Welfare League of America reported in 1986⁷ that, in 20 states surveyed, there were 35,014 reported cases of child abuse in 1983 and 55,965 cases of child sexual abuse reported in 1984, an increase in reporting of 59% in a one-year period.⁸ One recent study of reported estimates of child sexual abuse instances notes estimates that range from 50,000 to one million per year.⁹ Significantly, for purposes of this brief, the same study states:

The American Humane Association's national survey of state statistics on child protection shows a 200 percent increase in reports of sexual abuse since 1967, although it has been widely suggested that much of this increase is due to increased willingness to report episodes rather than to actual changes in behavior. (Emphasis supplied.)

All 50 states now have child abuse reporting laws.¹⁰ As would be supposed, numbers of cases reported have significantly increased since mandatory and voluntary child abuse reporting laws have been enacted. For example, the Final Report of Attorney General (of the State of California), John K. Van de Kamp's Commission on the Enforcement of Child Abuse Laws (April, 1985), notes that after California's Child Abuse Reporting Law (Penal Code Sections 11165 through 11174), went into effect January 1, 1981, the numbers of reports of child abuse rose from 25,000 in 1981 to 42,500 in 1983. (Report, at 1-3).

As is true of the Pennsylvania statute at issue in the instant case, the confidentiality of those reporting child abuse in California is strictly protected. A report, Child Abuse Prevention Handbook, published in a revised edition by the California Attorney General's office notes:

7. Too Young to Run: The Status of Child Abuse in America, Child Welfare League of America, 4400 First St., N.W. Washington, D.C. 20001 (1986).

8. Id. at 9. See also: Rust, "The Nightmare is Real", 14 Student Lawyer, 13, Law Student Division, American Bar Association (April 1986).

9. Eve, Empirical and Theoretical Findings Concerning Child and Adolescent Sexual Abuse: Implications for the Next Generation of Studies, VICTIMOLOGY: AN INTERNATIONAL JOURNAL, Vol. 10, at 97 (1985).

10. Weisberg and Wald, Confidentiality Laws and State Efforts to Protect Abused or Neglected Children, 18 Fam. L.Q. 143 (1984), at 144.

ACCESS TO REPORTS OF SUSPECTED CHILD ABUSE

Confidentiality regarding the identity of the reporters, the reports, and the records maintained by protective agencies and the Department of Justice Child Abuse Central Registry is strictly controlled.

IDENTITY OF REPORTERS

(Pen. Code, & 11167, subd. (c))

The identity of all persons who report known or suspected child abuse is confidential and may only be disclosed at follows:

- Between child protective agencies
- To counsel representing a child protective agency
- To the district attorney in a criminal prosecution
- To the district attorney in an action initiated under Welfare and Institutions Code section 602 (wards; minors violating laws defining crime) arising from alleged child abuse.
- To the child's counsel appointed pursuant to Welfare and Institutions Code section 318
- To the county counsel or district attorney in an action initiated under Civil Code section 232 (termination of rights) parental or Welfare and Institutions Code section 300 dependent children)
- By court order
- When the reporter waives confidentiality¹¹

The necessity of confidentiality of reporters in child abuse cases, including, of course, child sexual abuse cases, is elaborated upon in this Handbook:

THE ROLE OF THE COMMUNITY

Community members have an important role in protecting children from abuse and neglect. Individuals must recognize that child abuse is a community or neighborhood problem which can be prevented if we involve ourselves through various types of individual, neighborhood, or community action.

The life of a child may be saved if community members become involved and report cases of suspected child abuse. Fear of involvement has resulted in violent family tragedies in which the neighbors reported that they knew what was going on but declined to get involved.

11. Child Abuse Prevention Handbook, Office of the Attorney General, Suite 383, P.O. Box 944255, Sacramento, CA 94424-2550 (August, 1985), at 63.

Involvement does not mean physical intervention or snooping on your neighbor -it simply means not ignoring the obvious. If maltreatment of a child is suspected, a report should be made so that a qualified and experienced person can investigate the situation. The child protective agencies to report suspected child abuse include:

- The police or county sheriff's department.
- The county child welfare department (other names for this may be children's services department, department of public social services, etc.).
- The county juvenile probation department.

If a member of the community, who is not required by law to report, feels reluctant to identify himself or herself by name, it should be noted that reports may be made to the above agencies anonymously. (Pen Code, #11167, subd. (c).) For purposes of investigation and follow-up, however, it is preferred that the name and address of such a reporter be volunteered. The important thing is the immediate protection of the child. In any event, all names are confidential and can be released only by a court order to designated persons regardless of whether the reporter is one required by law to report.

For example, when the parents of an abused child ask for the name of the individual who reported them, the child protective agency will not release the name of the reporting person. Only a court can order such disclosure and will do so only under certain circumstances. Mandated reporters must give their names to a child protective agency when reporting. However, all reporters are protected by the cloak of confidentiality described above.¹²

California statutes also provide for absolute immunity from criminal or civil liability for reports made by mandated reporters and for such immunity of other persons reporting known or suspected child abuse unless the report was knowingly false.¹³

The importance of confidentiality in child abuse reporting laws cannot be exaggerated. As the Child Abuse Prevention Handbook notes, reluctance to "become involved" and fear of retaliation, may well prevent persons from making reports of child abuse, and without the assurances of confidentiality that are contained in statutes such as those of Pennsylvania, California and

other states,¹⁴ it is probable, indeed, highly likely, that many fewer child sexual abuse cases would be reported.

An analogy may be made between this Court's teachings in cases involving the confidentiality of the identities of informants in narcotics cases. Balancing the interests of society in being able to penetrate such secretive crimes as narcotics transactions, and in avoiding retaliation against informants, against the defendant's Sixth Amendment confrontation right, this Court has held that the public interest mandates that the identity of informants in narcotics cases shall not be routinely divulged, McCray v. Illinois, 386 U.S. 10 (1967); Roviaro v. United States, 353 U.S. 53 (1957), unless the defendant has made a prima facie showing that probable cause for a search warrant was based on a knowingly false statement in the affidavit, Franks v. Delaware, 438 U.S. 154 (1978).

Amici suggest that the secretive nature of the crimes involved in narcotics cases is even more pronounced in child sexual abuse cases. In the former class of cases, the participants in the crime, buyers and sellers, are at least on a relatively equal footing. In child sexual abuse cases, there is an unequal power relationship between the abuser and the abused. It has been noted that:

Sexual abuse is defined as interaction between a child and a more mature person (adolescent or adult) that involves manual, oral, or genital fondling or touching of either person's genitals. It is assumed that there is a combination of unequal power, sexual activity, and usually or eventually, fear. In addition the behavior is secret. Further, such involvement "sexualizes" the child which, in psychological terms, means that the child has experienced premature sexual awareness which because it is developmentally inappropriate, results in additional trauma to the child.

14. See, generally, Weisburg and Wald, Confidentiality Laws and State Efforts to Protect Abused or Neglected Children, 18 Fam. L.Q. 143 (1984), see fn. 10, supra. This article is concerned primarily with the issue of confidentiality between child abuse victims. The article concludes with the highly significant conclusions that:

Child abuse and neglect laws, abetted by mandatory reporting laws, have been designed to give the state the information it needs to protect children from harm, but these laws are often insufficient, especially because they bump against confidentiality laws in a complex set of statutory permutations which seem more the result of legislative inadvertence than design. The ill-coordinated relationship among these sets of laws tends to manifest itself in the confusion of professionals who lament that they cannot determine their legal duties and rights when they have confidential information about their patients which might bear on charges of child abuse or neglect. But of course the most serious consequence of this confusion may be preventable harm to children. (Emphasis supplied.)

12. id. at 32, 33.

13. Cal. Penal Law, Sec. 11172 (1981)

Most traumatic, however, is sexual abuse in cases where the victim and abuser are known to each other in a caretaking relationship. In this situation, the perpetrator of sexual abuse may be an adolescent or adult designated to be in a parental role and may include, in addition to the immediate biological family: extended family, stepparents, babysitters, day-care workers, teachers, youth group leaders, and any other adolescent or adult in a caretaking role. The abuser is therefore in a role of caretaker and abuser. For a child, this is doubly harmful, since assaults or molestations by strangers do not present conflict for the child, enabling the child to identify the abuser and to describe the abuser, more readily. (Emphasis supplied.)¹⁵

This comment highlights both the "unequal power" of the abuser, the unrealistic "fear" on the part of the abused, and the "secret" nature of the illicit relationship. It is essential that children or other observers report such crimes in order to penetrate this combination of factors. Amici submit that withdrawing the protective nature of confidentiality would "chill" the inclinations of those having knowledge of child abuse, victim or observer, in a manner that society cannot tolerate if it wishes to ferret out instances of child abuse and to punish the observers.

CONCLUSION

The Sixth Amendment's Confrontation Clause, as interpreted by this Court, does not mandate the newly-discovered, constitutional "right to rummage" in the files involved in child abuse cases enunciated by the Supreme Court of Pennsylvania. Conversely, public policy does dictate that the confidentiality of those reporting instances of child abuse should be preserved if the protection of children from sexual abusers is to be effectively enforced. For these reasons the decision of the Supreme Court of Pennsylvania should be reserved.

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15. Rust, "The Nightmare is Real ". 14 Student Lawyer 13, (1986), at 16, op. cit. supra, note 8.

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